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Supreme Court, U.S.
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No. 99-1533

IN THE
# SUPREME COURT OF THE UNITED STATES

M.C. PRODUCTS, INC., a California corporation; AUDIO ENTERTAINMENT NETWORK, INC., a Nevada corporation; DAVID L. KAHN,

*Petitioners*,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, now AT&T Corp.,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITIONERS' REPLY BRIEF

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## QUESTION PRESENTED FOR REVIEW

Whether a district court has the power, without prior notice to the parties, and contrary to Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952), and contrary to 28 U.S.C. Section 1404(a), to dismiss sua sponte an action with prejudice, unless within 30 days the complaint is refiled in another district.

## PARTIES TO THE PROCEEDING

**Petitioners**

M.C. Products, Inc. ("MCP") is a California corporation. Bellatrix International, Inc. owns 100% of its outstanding stock. Audio Entertainment Network, Inc. ("AEN") is a Nevada Corporation. Petitioner David Kahn owns 100% of its outstanding stock.

**Respondent**

The respondent is AT&T Corporation.

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## REASONS FOR GRANTING THE WRIT

### I. DEPARTURES FROM PROCEDURAL RULES ESTABLISHED BY THIS COURT AND CONGRESS MUST BE CORRECTED.

Procedural rules may not involve complicated legal reasoning but they always involve many cases filed and to be filed in every federal District Court. The action taken in these cases will affect every action which has a companion or even somewhat similar action pending in another federal District Court. In these cases the District Judge ordered (App. C at 16a):

> Plaintiff's Second Amended Complaint is dismissed in its entirety without prejudice. Plaintiff must re-file any claim(s) asserted in its Second Amended Complaint in the United States District Court for the District of Nevada, as a related matter to the case captioned MRO Communication Inc. v. AT&T Corp., CV-S-95-503 PLP (RLH), within 30 days from the date of this Order, or the Action shall be dismissed with prejudice.

These orders are contrary to Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 72 S.Ct. 219 (1952) in that Kerotest affirmed a stay, not an order to dismiss with prejudice claims on which the statute of limitations will have run.

The orders are also contrary to 28 U.S.C. Section 1404(a) which authorizes a transfer, not a stay.

AT&T does not dispute that neither Kerotest (and its progeny) nor Section 1404(a) authorize the orders in these cases; AT&T says a "broader principle" is involved: avoidance of duplicating litigation (AT&T Br. 4-5). But that "broader principle" is effectively and adequately served by Kerotest and Section 1404(a); AT&T has not shown otherwise. We are thus left with AT&T's assurance to the effect: "Not to worry, the Court of Appeals memorandum is unpublished" (AT&T Br. 3). Unpublished but not uncirculated on the Internet! The unpublished nature of the memorandum should not be allowed to preserve it. While this order has been circulated, there may have been others of a similar nature which have not been appealed or circulated. Certainly, District Courts will be informed of this Memorandum as a possible docket-clearing procedure.

## CONCLUSION

The Petition should be granted to correct the District Court's departure from the accepted and usual course of Judicial proceedings.

Dated: April 28, 2000.

Respectfully submitted,

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